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February 28, 2011

Michigan Supreme Court
c/o Corbin R. Davis, Clerk
P.O. Box 30052
Lansing, Michigan 48909

Re: ADM File No. 2006-38
Proposed Amendments of Subchapter 9.100

Honorable Justices:

I write to comment on the proposed amendments in certain specific areas that are addressed in a memorandum by Robert Agacinski of the State of Michigan Attorney Grievance Commission ("AGC") and Janet Welch of the State Bar of Michigan ("SBM") submitted to the Court April 7, 2010 ("AGC/SBM Memo"), pertaining to the grounds for discipline. By way of introduction and disclaimer, I have served as member and as chair of the State Bar of Michigan Standing Committee on Professional Ethics (2003-2010), as a member and chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility (1998-2006); and presently serve as a member of a Hearing Panel of the State of Michigan Attorney Discipline Board. I write solely on my own behalf, however, and nothing in this letter should be interpreted as a position of any organization with which I am affiliated.

I. Rule 9.104(A) Grounds for Discipline, Generally.

Presently there are two sets of rules in Michigan governing lawyer conduct for which there may be discipline: The Michigan Rules of Professional Conduct ("RPC") and Michigan Court Rule ("MCR") 9.104.[1] Both sets of rules are adopted by order of this Court. That there should be <u>any</u> difference between two sets of rules ostensibly carrying out the

[1] There are three sets of rules governing judicial conduct: The Michigan Code of Judicial Conduct, the Michigan Rules of Professional Conduct, and Michigan Court Rule 9.205. All three sets of Rules are promulgated by the Michigan Supreme Court.

same purpose is inexplicable and at best sloppy. There should be a single coordinated set of rules for conduct outside the disciplinary process itself.[2]

(a) MCR 9.104(A)(1). This MCR provides for discipline for conduct prejudicial to the "proper" administration of justice. RPC 8.4(c) provides that it is misconduct (and hence grounds for discipline – *see* RPC 1.0 *COMMENT Scope*) for a lawyer to engage in conduct that is prejudicial to the administration of justice. Whatever difference there is between administration, in one rule, and proper administration, in another rule, is left to mischief. Arguably, the standard for discipline under MCR 9.104(A)(1) will encompass a smaller universe of behavior than that which could be subject to discipline under RPC 8.4(c). Omitting (A)(1) in deference to RPC 8.4(a) will remove this needless apparent conflict between rules that should address one subject.

(b) MCR 9.104(A)(4). Both the AGC and SBM seem to agree that MCR 9.104(A)(4) must be fixed to refer to the correct set of rules that govern lawyer conduct. Those rules, *not* standards, are the "Rules of Professional Conduct" – and are so referred to exactly as such in RPC 8.4 as well as in MCR 9.205(B)(2), which pertains to judicial misconduct. The word "standards" should be dropped, and the Rules referred to by their proper name. RPC 8.4(a) declares that it is misconduct to violate "or attempt to violate" the Rules of Professional Conduct or to assist or induce another to do so or do so through the acts of another. The Court Rule addresses only a violation, whereas the RPC covers an attempt to violate as well. Inconsistency results in a substantive difference. The RPC is more comprehensive.

(c) MCR 9.104(A)(5). This Court Rule presently declares that it is misconduct and grounds for discipline for a lawyer to engage in conduct that violates a criminal law. RPC 8.4(b) declares it to be misconduct for a lawyer to engage in conduct that violates criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. The offense under the Rule of Professional Conduct is clearly limited to an effect, but the Court Rule disregards the effect. Thus there are two separate rules governing criminal conduct by lawyers, one in the Rules of Professional Conduct and the other in the Court Rule. They conflict.

Criminal conduct as a professional disciplinary offense has been linked historically to reflection on a lawyer's fitness as a lawyer, as noted in Comment to RPC 8.4. The Code of Professional Responsibility, predecessor to the Rules of Professional Conduct adopted in Michigan in 1988, at DR 1-102 did not expressly address criminal conduct, but more

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[2] The AGC contends that the SBM proposal to eliminate 4 subrules, two of which are covered in the RPC, would undermine the ability of the Judicial Tenure Commission to discipline judges, by forcing reliance on the RPC 8.4, instead of the MCR 9.104(A), standards. This appears to be a misreading of rules applicable to judicial misconduct. MCR 9.205(B) makes clear that misconduct for judges includes those matters enumerated in (1), as well as violation of the Code of Judicial Conduct and the Rules of Professional Conduct in (2). Nowhere is it suggested that judicial discipline incorporates MCR 9.104(A). The breadth of the Code of Judicial Conduct adequately covers the subjects of MCR 9.104(A)(2) and (3). See in particular, Canon 1 and Canon 2. I cannot conceive of action or omission that would be chargeable under MCR 9.104(A)(2) or (3) that would not be chargeable under Canon 1 or 2. Despite some practice to the contrary, the need for and the use of 9.104(A) in judicial misconduct is questionable.

generally declared it to be misconduct for a lawyer to "engage in any other conduct that adversely reflects on his fitness to practice law" (DR 1-102(A)(6)).[3]

Similarly ABA Model Rule 8.4(b) describes misconduct as to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," as does Michigan's RPC 8.4(b). This Court has recently considered changes to the Michigan Rules of Professional Conduct, and decided to leave Rule 8.4 unchanged, validating the required relationship of criminal conduct with fitness to practice. ADM File No. 2009-06. The Court has spoken on this subject already. It is more than a per se test. There has been a purpose found in requiring that the criminal acts of a lawyer relate to the lawyer's fitness as a lawyer. MCR 9.104(A)(5) should be deleted in favor of RPC 8.4(b), which clearly permits, but also requires, connecting criminal conduct with fitness.

(d) MCR 9.104(A)(2) and (3). These two subrules contain obscure and vague concepts that should be considered as codified to the extent the ideas are at all relevant in RPC 8.4, to which could be added the language suggested by the Attorney Discipline Board ("ADB") of a more general statement of misconduct, derived from DR 1-102(A)(6): "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law." AGC/SBM Memo, note 4. The AGC asserts that without retention of these vague rules sex with clients would be permissible.[4] In the interest of having a single set of rules of professional conduct, the ADB suggestion presents a vehicle for accommodating the coverage that might be otherwise constricted by reliance on Michigan's RPC 8.4 as presently written. It is a better alternative than the obscure provision of (A)(2) and the constitutional vagueness of (A)(3).

The AGC contends that the ADB suggested new language to RPC 8.4 would not carry with it the "gloss" of case law interpretation. The AGC ignores the fact that this language has all the history and interpretive patina of the Code rule on misconduct in Michigan until 1988, and in other states where the suggested rule has been continued. The AGC also misinterprets the proposed language as requiring some evidence of actual adverse affect on the lawyer's practice of law. The same language – "adversely affects the lawyer's fitness to practice law" – is already in RPC 8.4(b). Surely the AGC has not been required to prove actual adverse affect when proceeding against a lawyer under this Rule, which has been in place since 1988. The subject is "fitness for practice," not effect on practice.

(e) Single Set of Professional Conduct Rules. There are reasons other than jeopardy, inconsistency, and relevancy that argue in favor of having a single set of rules of professional conduct, and that rules providing the basis for misconduct should be found

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[3] DR 1-102(A)(3) also forbade "illegal conduct involving moral turpitude" which covered some criminal conduct, but not all.

[4] This Court had the opportunity to amend RPC 1.8 in 1998 to add prohibition of sex with clients, and again in 2003 (ADM File No. 2003-62, p.41) and, presumably, again in 2010 in publishing ADM File No. 2009-06 when it ordered amendments to the RPC. According to ADM File No. 2003-62, the Court declined to do so on the basis of MCR 9.104(A)(3). For purposes of rules of professional discipline, this was an unfortunate choice in favor of a divided set of rules.

Rules of Professional Conduct rather than in Court Rules. The RPC are widely interpreted based on relatively common language by courts and bar ethics committees in at least 50 United States jurisdictions, as well as subject to public debate and exploration by learned authors and commentators and by the ABA Standing Committee on Ethics and Professional Responsibility, while court rules differ from state to state and are interpreted only by courts of one jurisdiction. There is a far greater body of interpretive wealth on Rules of Professional Conduct that should be mined in this important area.

II. New 9.104(B) – Prior Acts and Omissions

In justifying proposed new MCR 9.104(B), the AGC states that the rule would permit prior discipline to be charged in a formal complaint, and that inclusion of a prior disciplinary record is appropriate to show a pattern of misconduct and fitness. The proposed rule goes much further than that. It refers to "multiple acts and omissions" demonstrating absence of fitness (at least some standard) in one place, and to "prior acts and omissions" without limitations as to effect in another – none of which may have been a matter of prior discipline or even individually the basis for discipline. Yet the cumulative effect of these "professional annoyances" can be used as its own basis for discipline, even though none have been charged or proven. The purpose of this rule can only be suspect – to get the lawyers we don't like but can't convict, or have never tried.

Prior discipline is an appropriate consideration in determining remedies and penalties for a violation. Conduct may at any time be charged, but a history of unprosecuted and unproven offense is simply prejudicial.

Conclusion

The State Bar of Michigan alternative B gets it right in principle. There is no good purpose to be served by two sets of inconsistent rules, and the preservation of two overly general categories of conduct. I urge the Court to get it right in one place, not wrong in two. Amend Rule 8.4 if necessary, but confine the substance of Court Rules to the procedure of discipline, not a second, and inconsistent, set of causes.

Respectfully,

William B Dan

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Copies to:
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